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In The

Supreme Court of the United States

October Term, 1996

DOUBLE R INC., d/b/a/ DOUBLE R VENDING, INC., ROGER C. GENTER, ROGER C. GENTER d/b/a DOUBLE R VENDING, INC.,

Petitioners,

vs.

MICHAEL F. LEARY,

Respondent,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTION PRESENTED

I. Does the Americans with Disabilities Act require a Plaintiff to prove that his/her disability was the sole cause of an adverse employment decision?

LIST OF PARTIES

The names of all parties in the court below appear in the caption of the case. Double R, Inc., a Georgia corporation, has no parent or subsidiary companies.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	2
Statute Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
I. The Americans with Disabilities Act requires that a Plaintiff show that disability was the sole cause of an adverse employment decision.	8
Conclusion	10

Contents

Page

TABLE OF AUTHORITIES

Cases Cited:

McNeely v. Ocala Star-Banner Corporation, 99 F.3d 1068 (11th Cir. 1996) 6

Linda Williams v. Channel Master Sattellite Systems, Inc. 1996 U.S. App. Lexis 30888 (4th Cir. 1996) 7

Champ v. Baltimore County Maryland, 1996 U.S. App. Lexis 16417 (4th Cir. 1996) 7

Doe v. University of Maryland Medical Systems Corp., 50 F.3d 1261, 1265 (4th Cir. 1995) 7

Turco v. Hoechist Celanese Chemical Group, Inc., 1996 U.S. App. Lexis 33478 (5th Cir. 1996) 7

Rizzo v. Childrens World Learning Centers, Inc. 84 F.3d 758, 763 (5th Cir. 1996) 7

Roush v. Weastec, Inc., 96 F.3d 840 (6th Cir. 1996) 7

John Does 1-5 v. Chandler, 83 F.3d 1150 (9th Cir. 1996) 7

White v. York Int'l Corp., 45 F.3d 357, 360-61 (10th Cir. 1995) 7

Lambros v. Hawk, 1996 U.S. App. Lexis 20483 (D.C. Cir. 1996) 7

Contents

Page

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 8

Texas Department of Community Affairs v. Burdine, 450 U.S. 248(1981) 8

School Baord of Nassau County v. Arline, 480 U.S. 273 (1987) 8

Ristoff v. United States, 839 F.2d 1242 (7th Cir. 1988 8

Carter v. Casa Central, 849 F.2d 1048 (7th Cir. 1988) 8

Pesterfield v. TVA, 941 F.2d 437 (6th Cir. 1991) 8

Doe v. New York University, 666 F.2d 110 (5th Cir. 1982) 8

Norcross v. Sneed, 755 F. 2d 113 (8th Cir. 1985) 8

Pushkin v. Regents of Univ. Of Colo., 658 F.2d 1372 (10th Cir. 1981) 8

Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983) 8

Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L.Ed. 2d 268 (1989) 9-10

Contents

Page

Statutes Cited:

28 U.S.C. § 1254(1) 2

42 U.S.C. § 12112(a) 2

42 U.S.C. § 12201(a) 2

42 U.S.C. § 12111(8) 8

42 U.S.C. § 12102(9) 9

42 U.S.C. § 2000e-2(m) 9

APPENDIX

Appendix A - Opinion of the United States Court of Appeals for the Eleventh Circuit Dated December 10, 1996 ..... 1a

Appendix B - Order of the United States Court of Appeals for the Eleventh Circuit Dated April 29, 1997 ..... 2b

Appendix C - Summary of the argument from Petitioners' appellate brief to the Eleventh Circuit Court of Appeals filed February 9, 1996 ..... 3c

No.

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PETITION FOR WRIT OF CERTIORARI

NOW COME THE PETITIONERS and respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 1996 U.S. App. Lexis 33739 (11th Cir. 1996), and is reproduced in the Appendix to this Petition. (Appendix A)

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on December 10, 1996. Petitioner filed a timely Petition for Rehearing with suggestion for rehearing en banc on December 31, 1996. The Petition was denied in an Order dated April 29, 1997, which is reproduced in the Appendix. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of 42 U.S.C. § 12112(a) is set forth below:

> "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment."

42 U.S.C. § 12201(a) provides that:

> "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title."

STATEMENT OF THE CASE

Michael F. Leary ("Leary") is a fifty-one year-old high school graduate who resides in Lawrenceville, Georgia. In 1975, while living in Ohio, Leary was employed as a dock worker. While a dock worker Leary made his living loading and unloading trucks.

In 1975, while working as a dock worker, Leary slipped and fell after stepping in some oil while pushing a hand-truck. As a result of his fall, Leary had to seek medical treatment. Dr. Schultz, a medical doctor practicing in Ravenna, Ohio, treated Leary for around four months. He would not see a medical doctor for back problems again until sometime around 1991 or 1992. After being cleared by Dr, Schultz Leary began visiting a chiropractor for back "adjustments", a practice he was to continue on and off for the next twenty years. On direct examination Leary testified that, as a result of the 1975 injury, he missed somewhere between "a month-and-one-half or two months" of work. On cross-examination Leary testified that the incident caused him to miss "around two weeks, three weeks" of work. Regardless, Leary testified that he was able to return to work as a dock worker and he remained gainfully employed in that occupation for the next ten years although it caused him some discomfort.

Leary usually goes to a chiropractor three times a week in order to "feel better". Sometimes his back becomes aggravated and he has trouble walking and standing strait. In order to avoid further aggravating his back he refrains from bowling and softball. Leary testified that he has no physical impairments that would impair his ability to work.

In 1985 or 1986, Leary moved from Ohio to Georgia. He found temporary work as a dock worker but it caused him discomfort so he went to work for Pepsi-Cola as a forklift driver. Leary remained at Pepsi-Cola for approximately one year. A fellow member of the fraternal order of the Eagles, Ben Nixon, sent Leary to Double R, Inc., where he was hired by the president of Double R, Inc., Roger C. Genter. On his written job application Leary did not list any disabling conditions which would affect his ability to work.

Leary went to work at Double R, Inc., in 1986 as a route man. In the common course of his employment Leary was called upon to lift boxes of candy that weighed approximately 70 lbs.

Genter became aware of the problems Leary had with his back sometime in 1986 or 1987. DeLeon testified that he came to know that Leary had problems with his back approximately six months after he came to work at Double R, Inc., when Leary told DeLeon of his plans to go to the chiropractor after work. Butler was aware of Leary's back problem from the time he came to Double R, Inc. Butler characterized his knowledge of Leary's back problem as follows: "I knew that he had problems with his back. He had pain with his back. He had soreness in his back, and there were days that he could function better than others."

In 1990 or 1991 Leary had a flare up with his back that prompted him to go to a neurosurgeon. Leary was treated in the hospital as an out-patient with an epidural needle. The doctor saw Mr. Leary on two occasions and then advised him to pursue a Rehabilitation program. Leary testified under direct examination that this flare-up caused him to miss two-and-one-half months of work. On cross-examination he testified that this flare-up caused him to miss one to one-and-one-half months. This was his only significant absence while employed at Double R, Inc. Genter was not aware of Leary's extended absence. DeLeon was not aware of this specific absence. DeLeon was aware that he took some time off at one point to visit his ailing father in Baltimore. In fact, Genter or DeLeon had little day-to-day contact with the route supervisors and route men. They were kept informed as to the route supervisors relative performance on a daily basis by the supervisors' direct supervisor, Butler. Sue Leary testified that she spoke with both Genter and Butler on the telephone and that they were supportive and emphatic in assuring her that his job was secure.

In December of 1992 Double R, Inc., received 60-days notice that they had lost their largest account. The Dekalb County Hospital System account provided Double R, Inc., with a weekly income of approximately $7,000.00. At that time a decision was made to downsize the company staff if new accounts did not quickly offset it.

At the time the decision was made to downsize Double R

Inc., three people were employed as full-time route supervisors. Leary had been a route supervisor for four to four-and-one-half years. Leary had a reputation for being forgetful and unable to remember the stops on routes. This translated into an inability to run the routes as well as the other route supervisors. He had also made crude references to Genter in Butler's presence. He made other employees uncomfortable by swearing. He had come to work on occasion with detectable alcohol on his breath. Jimmy Bishop ("Bishop") had been a route supervisor for three years. He had a military background and had been counseled by Butler for being too hard on people. Debbie Bryant had been a route supervisor for six months. During her training period Butler had counseled her as to how to train new employees.

With the loss of the Dekalb County Hospital Account Genter and DeLeon decided that they needed to take some remedial action. They felt that there were three departments that could be effectively downsized in an attempt to recoup some of the losses incurred as a result of losing their biggest account. Mike Williams in O.C.S. Coffee was immediately terminated. After a period of months passed and no accounts were gained to offset the loss of the Hospital account, Genter and Deleon decided that they had to terminate someone at the supervisory level. After looking at the three route supervisors and Perry Butler the decision was made that Leary was the least essential of the four supervisors. In a situation characterized by DeLeon as being "odd man out" the decision was made to terminate Leary. Leary had a history of being unable to remember the routes he was assigned to run. Genter and DeLeon decided to terminate Leary and let Butler cover as route supervisor when necessary. Leary's back problems played absolutely no role in the decision to terminate him. In April of 1993 Leary was terminated by Butler in DeLeon's office with DeLeon present.

This case was filed by the Plaintiff in the United States District Court for the Northern District of Georgia under the jurisdictional authority of 28 U.S.C. 1343 (a)(4).

The jury trial of this case began on June 12, 1995 [R 2-1]. The parties submitted individual as well as joint Requests to Charge [R. 1-21,22,23]. At the close of Appellee's case Appellants made a Motion for Directed Verdict [R 3-227]. The Appellants submitted written copies of their Motions as well as Briefs in Support [R. 1-25,26]. The motions partially dealt with the "solely because of" causation standard in an Americans with Disabilities Act case. The motions were denied by the trial court [R. 3-235]. At the close of the presentation of evidence Appellants renewed their Motions for Directed Verdict which were again denied by the trial court [R. 4-320, 4-323]. At the charge conference the Appellants objected to the Court's charge on the weight of evidence necessary to authorize a plaintiff's verdict under the Americans with Disabilities Act [R. 4-314 to 317]. The Appellants renewed their objections at the end of the trial court's charge to the jury [R. 4-346]

On June 26, 1995, Appellants submitted their Motion for New Trial and/or Judgment Notwithstanding the Verdict [R. 1-31]. On September 26, 1995, the court issued its order denying Appellant's Motion for New Trial and/or Judgment Notwithstanding the Verdict.

The Appellants filed their timely Notice of Appeal to the Court of Appeals for the Eleventh Circuit on October 25, 1995 [R. 1-40].

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve a split between the federal circuit courts of appeals on the interpretation of the Americans with Disabilities Act. In a decision rendered days before this case was orally argued the Eleventh Circuit ruled that the Americans with Disabilities Act implicitly adopted a "but-for" rather than the "solely because of" causation standard. McNely v. Ocala Star-Banner Corporation, 99 F.3d 1068 (1996 U.S. App. Lexis 30020) (1996). The Courts of Appeals for the Fourth, Fifth, Sixth,

Ninth and Tenth Circuits as well as the D.C. Circuit have all published decisions which held that "To prevail on an ADA claim, a plaintiff must prove that 1) he has a "disability"; 2) he is qualified for the job; and 3) an adverse employment decision was made solely because of his disability." Linda Williams v. Channel Master Sattellite Systems, Inc., 1996 U.S. App. Lexis 30888 (4th Cir. 1996); Champ v. Baltimore County Maryland, 1996 U.S. App. Lexis 16417 (4th Cir. 1996); Doe v. University of Maryland Medical Systems Corp., 50 F.3d 1261, 1265 (4th Cir. 1995); Turco v. Hoechist Celanese Chemical Group, Inc., 1996 U.S. App. Lexis 33478 (5th Cir. 1996); Rizzo v. Childrens World Learning Centers, Inc. 84 F.3d 758, 763 (5th Cir. 1996); Roush v. Weastec, Inc., 96 F.3d 840 (6th Cir. 1996); John Does 1-5 v. Chandler, 83 F.3d 1150 (9th Cir. 1996); White v. York Int'l Corp., 45 F.3d 357, 360-61 (10th Cir. 1995); Lambros v. Hawk, 1996 U.S. App. Lexis 20483 (D.C. Cir. 1996).

Under the Americans with Disabilities Act disability should be shown to be the sole motive for an adverse employment decision. A plaintiff is entitled to no preferential treatment where nondiscriminatory motives factor into the employment decision. The Petitioners, a small corporation and its president, should be free to make decisions that they feel are in the best interests of the corporation. To preclude the officers of a small business from making decisions that they feel are in the best interests of the corporation simply because an individual slipped and fell on a dock twenty years ago is to elevate anyone who occasionally suffers from soreness and pain a to superior position in employment to those who are free of such impediments. Rather than providing for equality in employment the Eleventh Circuit's interpretation of the Americans with Disabilities Act creates a protected class with rights superior to non-disabled workers. This result cannot stand.

I.

THE AMERICANS WITH DISABILITIES ACT REQUIRES THAT A PLAINTIFF SHOW THAT DISABILITY WAS THE SOLE CAUSE OF AN ADVERSE EMPLOYMENT DECISION.

The first and second elements of the Plaintiff's prima facie burden of proof in a case under the Americans with Disabilities Act, as cross-applied to the analytical framework enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), are explicitly stated in the ADA. 42 U.S.C. § 12111(8). However, Appellant contends that a plaintiff in an Americans with Disabilities Act case must demonstrate that disability was the sole motivating factor for an adverse employment decision rather than one of several motivating factors.

Virtually all of the cases concerning the Rehabilitation Act have held that the plaintiff must prove that disability was the sole basis for an exclusion from a position. See School Board of Nassau County v. Arline, 480 U.S. 273 (1987); Ristoff v. United States, 839 F.2d 1242 (7th Cir. 1988); Carter v. Casa Central, 849 F.2d 1048 (7th Cir. 1988); Pesterfield v. TVA, 941 F.2d 437 (6th Cir. 1991); Doe v. New York University, 666 F.2d 113 (2d Cir. 1981) (adopted in Norcross v. Sneed, 755 F.2d 113 (8th Cir. 1985)); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981); Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983).

The Rehabilitation Act and ADA protect only persons who are "qualified," whereas Title VII proscribes all levels of class-based differentiation. Accordingly, individuals who are handicapped, or, for purposes of ADA, disabled, are afforded only an equal footing to compete for jobs with others, and a plaintiff is entitled to no preferential treatment where other nondiscriminatory motives factor into the challenged action. This conclusion is supported by the

congressional findings stated in § 2 of ADA, 42 U.S.C. § 12102(9), that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous...."

In addition to the overwhelming case law under the Rehabilitation Act, another compelling reason for requiring a Plaintiff to prove that unlawful discrimination was the sole reason rather than a reason for Defendants action, is that the ADA was excluded from recent federal legislation on this very issue.

The Civil Rights Act of 1991 (Public L. 102-166, 105 Stat. 1071) made sweeping amendments to civil rights laws, including the recently enacted ADA which, at the time, in many respects had not yet become effective. Specifically, § 107 of the 1991 Act added subsection (m) to § 703 of Title VII. Thus, 42 U.S.C. § 2000e-2 now reads at the newly added subsection (m):

> "...an unlawful employment practice is established when the complaining party demonstrates the race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

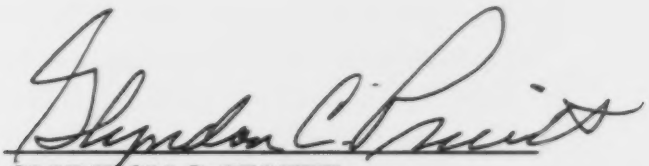
Conspicuously absent from the amendments of the Civil Rights Act of 1991 is any similar language applicable to the ADA. Clearly, Congress did not intend to interrupt the well-reasoned and thoroughly developed body of law that existed under the Rehabilitation Act which, again, Congress intended would apply in ADA cases. The McNeely decision by the Eleventh Circuit seems to hold that the statement of purpose of the Americans with Disabilities Act authorizes a "motivating factor" standard of proof when the legislature specifically declined to apply that standard to the ADA when amending other civil rights statutes in response to the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228, 104

L.Ed. 2d 268(1989).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED DECEMBER 10, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9366

D.C. Docket No. 1:94-CV-1191

MICHAEL F. LEARY,

Plaintiff-Appellee,

versus

DOUBLE R INC., d.b.a. Double R. Vending, Inc., ROGER C. GENTER, d.b.a. Double R Vending, Inc.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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(December 10, 1996)

Before HATCHETT, Chief Judge, BIRCH, Circuit Judge, and CLARK, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11TH Cir. R. 36-1.

APPENDIX B - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED APRIL 29, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9366

MICHAEL F. LEARY,

Plaintiff-Appellee,

versus

DOUBLE R INC., d.b.a. Double R. Vending, Inc., ROGER C. GENTER, d.b.a. Double R Vending, Inc.,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Georgia

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Before HATCHETT, Chief Judge, BIRCH, Circuit Judge, and CLARK, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellants is DENIED.

ENTERED FOR THE COURT:

JACK W. HATCHETT
UNITED STATES CIRCUIT JUDGE

ORD-41

APPENDIX 3C - SUMMARY OF THE ARGUMENT FROM PETITIONERS' APPELLATE BRIEF TO THE ELEVENTH CIRCUIT COURT OF APPEALS FILED FEBRUARY 9, 1996

Summary of the Argument

Issue I-A: Under the Americans with Disabilities Act disability must be shown to be the sole motive for an adverse employment decision. A plaintiff is entitled to no preferential treatment where other nondiscriminatory motives factor into the employment decision. The Appellants, a small corporation and its president, are free to make decisions that they feel are in the best interests of the corporation. As a result of the loss of major accounts in a business that operates on a weekly cash-flow basis the officers of Double R, Inc., felt that they had to terminate someone at the supervisory level [R. 2-100; 3-142,248,266]. Testimony established that they reviewed all the applicants and found Leary to be the least essential [R. 2-100; 3-133,140,142,176,248,249, 256,266]. To preclude the officers of a small business from making a decision that they feel is in the best interests of the corporation simply because an individual slipped and fell on a dock twenty years ago is to elevate anyone who occasionally suffers from soreness and pain a to superior position in employment to those who are free of such impediments. While Appellants unconditionally aver that Mr. Leary's back condition played no role in his termination the Appellee certainly did not present any evidence sufficient to establish that it was the sole cause of his termination.

Issue I-B: The evidence as a matter of law failed to authorize the jury to disregard Double R, Inc. The evidence did not show commingling of funds, disregard of the corporate form, such unity of interest that the separate personalities of the corporation and the owners no longer existed or that adherence

to the doctrine of corporate entity would promote injustice or protect fraud. Double R, Inc., is a small twenty-two year-old closely-held corporation that has always adhered to a corporate form. The officers of Double R, Inc., in their respective roles, all act only in the interest of the corporation. Should the Appellee's position be allowed to stand all small closely held corporations would be disregardable as a matter of course.

Issue II: The trial court erred in his charge to the jury on the weight of evidence necessary to authorize a plaintiff's verdict in a case under the Americans with Disabilities Act of 1990. The court should have charged, as the defendants requested, that a plaintiff in an ADA case must demonstrate that their disability was the sole cause of the adverse employment decision. In his charge the court provided the jury with the standard of proof required in a claim under the Civil Rights Act as amended in 1991. There is no precedent under the Americans with Disabilities Act or the Rehabilitation Act of 1973 that authorizes a charge that disability must be shown to be only a "motivating factor". In view of the allegations of the complaint, the evidence presented, the arguments of counsel, and the comments of the trial court, it is clear that the jury was misled and failed to understand the issues submitted to them for determination.